

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

STATE OF CONNECTICUT, and )	
THE GENERAL ASSEMBLY OF THE )	CIVIL ACTION NO. 3:05cv1330 (MRK)
STATE OF CONNECTICUT )	
<i>Plaintiffs</i> )	
)	
v. )	
)	
MARGARET SPELLINGS, )	
SECRETARY OF EDUCATION )	
<i>Defendant</i> )	FEBRUARY 28, 2006
) )	

**STATE’S MEMORANDUM REGARDING ITS FIRST AMENDED COMPLAINT**

**INTRODUCTION**

Pursuant to the Court’s Order of January 31, 2006, the plaintiffs State of Connecticut and its legislature (collectively the “State”) respectfully submit this memorandum in connection with the First Amended Complaint filed simultaneously with this memorandum. Specifically, the Court offered the State the opportunity to amend its complaint to add further allegations of harm, to elaborate on its allegations of the insufficiency of federal funding to meet the federal requirements of the No Child Left Behind Act, Pub. L. No. 107-110, 20 U.S.C § 6301 et seq. (the “NCLB Act”), and to clarify the State’s administrative appeal allegations. Because the accompanying First Amended Complaint amply addresses those issues, the defendant Secretary of Education’s (“Secretary’s”) motion to dismiss should be denied.

**MOTION TO DISMISS STANDARD**

It is well settled in federal practice that a plaintiff need only provide notice of its claims, and need not plead its evidence. Thus, a complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Federal Rule of Civil Procedure 8(a)(2). This simplified notice pleading standard “relies on liberal discovery rules and

summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.” Swierkiewicz v. Sorena N.A., 534 U.S. 506, 512 (2002), *citing* Conley v. Gibson, 355 U.S. 41, 47 (1957). For purposes of determining a motion to dismiss, all factual allegations contained in the complaint must be accepted as true. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993). “Given the Federal rules’ simplified standard for pleading, ‘[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’” Swierkiewicz, 534 U.S. at 514, *quoting* Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

### **OVERVIEW OF AMENDMENTS TO COMPLAINT**

In its First Amended Complaint, the State retains its three causes of actions, elaborates upon its factual and legal allegations, and refines its prayers for relief. Advised by the Court to allege its best possible case, the State has substantially increased the number and detail of its factual allegations.<sup>1</sup> The State explains in greater detail the requirements of the NCLB Act, the complex process involved in complying with the terms of the NCLB Act, and the Secretary’s approval of Connecticut’s plans and standards as appropriate under the Act.<sup>2</sup> The State also

---

<sup>1</sup> The majority of the State’s additional allegations are directed to the Secretary’s defenses presented in her motion to dismiss, for the Secretary has not yet answered the complaint nor presented any special defenses.

<sup>2</sup> The State has understood from on-the-record conferences with the Court that evidence outside the four-corners of the complaint would not be considered for purposes of deciding the Secretary’s motion to dismiss. The State further understood that the Secretary has withdrawn any reliance upon such outside materials, notwithstanding having cited generously to them in advancing her motion. These understandings were cast in doubt during the detailed factual discussion at oral argument. If the Court deems such evidence as “incorporated by reference” into the complaint, then the State urges the Court to review all of the referenced materials, and not just the carefully-selected subset referenced by the Secretary in her memorandum in support of her motion to dismiss. The State respectfully submits that such a limited selection of evidence relevant to the State’s claims is at best incomplete, and at worst, misleading. Moreover, the First Amended Complaint substantially increases the references to outside evidentiary materials. Should the Court choose to rely on outside evidentiary materials referenced in the amended

provides factual allegations regarding the harm imposed upon the State by the Secretary's actions. The State expressly alleges that federal funding is insufficient to meet the federal requirements imposed upon the State under the NCLB Act, both overall and with respect to mandatory assessments. Federal funding remains insufficient even if the State adopted Deputy Secretary Simon's oral suggestions to modify Connecticut's assessment scheme.

Finally, the First Amended Complaint clarifies the legal bases of the administrative appeal and explicitly alleges that, with respect to Connecticut's alternate-grade formative testing waiver request, the Secretary abdicated her statutory duty to consider waiver requests regarding any statutory or regulatory requirement of the NCLB Act. The State respectfully submits that its First Amended Complaint further establishes that the Secretary's motion to dismiss must be denied.

### **ARGUMENT**

The linchpin of the State's three causes of action remains the Unfunded Mandates Provision of the NCLB Act, NCLB Act § 9527, codified at 20 U.S.C. § 7907 (hereinafter referred to as the "Unfunded Mandates Provision.") The State's first count presents a straightforward legal issue of statutory construction, namely a request for a declaratory ruling regarding the meaning of the Unfunded Mandates Provision. The second count, asserting Spending Clause and Tenth Amendment violations, contends that if the Unfunded Mandates Provision does not mean what the plain language expressly provides, then the State was misled when it entered into this essentially contractual relationship with the federal government. This count further alleges that the Secretary's proposed sanctions for opting-out of the NCLB Act are so extreme and unrelated to the provisions of the NCLB Act that their coercive effects violate the

---

complaint, the State respectfully requests that the Court review all such materials, not a subset, and requests the opportunity to provide and be heard regarding such materials.

Secretary's constitutional constraints. In the third count, the State brings an administrative appeal from the Secretary's denial of the State's waiver requests, which denial was based in significant part upon the Secretary's misguided interpretation of the Unfunded Mandates Provision. Under this count, in order to determine whether the Secretary abused her discretion, the Court also must decide the meaning of the Unfunded Mandates Provision. The State contends that if the Unfunded Mandates Provision means what its plain wording requires, then the Secretary's waiver and implementation decisions were based in material part upon an inaccurate construction of that provision. Thus, the foundation of each of the State's three counts rests upon obtaining a judicial interpretation of the Unfunded Mandates Provision.

The Secretary's jurisdictional challenges improperly seek to transform the State's action for declaratory relief premised on the meaning of the Unfunded Mandates Provision into an enforcement action wherein the State would be required to violate the Act and the State's assurances to the Secretary in order to trigger an adjudicatory process to determine--not the meaning of a statute--but whether the State violated the Act and its assurances. This approach to what is a legitimate difference of opinion between two sovereigns on the meaning of a federal statute should be rejected.

As set forth more fully below, the First Amended Complaint clearly asserts that the State, and its neediest school districts and students, face real, immediate harm if denied judicial review. The State is spending its own funds on NCLB Mandates now. The First Amended Complaint also highlights the parties' factual dispute over the adequacy of funding levels, thus eliminating the Secretary's legal sufficiency challenge on that basis. Finally, it clarifies the bases of the State's administrative action under the Administrative Procedures Act (APA).

**I. THE STATE FACES REAL, IMMEDIATE HARM.**

The State has amended its prayers for relief and complaint allegations to clarify that the first count simply seeks a declaratory judgment on the meaning of the NCLB's Unfunded Mandates Provision. The State's claim for legal guidance from the Court on a critical term of a comprehensive federal statutory scheme falls squarely within the criteria for obtaining a declaratory judgment in the federal courts. The State faces substantial and immediate harm if it is denied access to such judicial relief.

In contrast to the plaintiffs in Thunder Basin who sought judicial review to avoid compliance with the statutory scheme, here the State is and remains in compliance with the provisions of the NCLB Act as interpreted by the Secretary, and with the State's assurances to the Secretary. Am. Compl. ¶¶ 4, 41. Compare Thunder Basin v. Reich, 510 U.S. 200, 204-05 (1994) (rather than comply, plaintiffs filed suit in federal court). The State seeks neither to violate the NCLB Act, nor to avoid its requirements. Rather, the State seeks a declaratory ruling regarding the interpretation of the Unfunded Mandates Provision and an order requiring the Secretary to comply with the Court's ruling on that interpretation. See Amend. Prayers ¶¶ 1-3.

The Secretary's efforts to require the State to violate both the Act and its assurances as a prerequisite to obtaining declaratory relief illustrate the extent of the State's harm. The Secretary has never represented that the State could obtain declaratory relief on the meaning of the Unfunded Mandates Provision through the administrative process. Rather, in her carefully-worded argument, the Secretary concedes that any administrative hearing would only address whether the State had violated the Act and/or the State's assurances. Under this scenario, the State would be placed in a "no win" situation—it would need to violate the Act and the State's assurances in order to access the administrative process, which would be charged with

determining whether the State had violated the Act and its assurances, not whether the Secretary had misinterpreted and misapplied the Act. Indeed, the General Education Provisions Act (GEPA) lacks any procedural mechanism for the State to even initiate a proceeding before the U.S. Education Department's administrative law judges; the Secretary must initiate an enforcement proceeding following a violation of the Act in order to invoke the GEPA administrative process. *See* 20 U.S.C. §§1234a, 1234e, 1234f, 1234h.

The Secretary has argued that if the State has correctly interpreted the Unfunded Mandates Provision, then the State may be found not to have violated the Act. The Secretary is notably silent, however, on the issue of how the definition of the Unfunded Mandates Provision would affect the further inquiry into whether the State had violated its assurances, the true basis for GEPA enforcement actions. Regardless of any legal interpretation of the Unfunded Mandates Provision, the State undoubtedly would, by definition, be deemed to have violated its assurances, since, under the Secretary's paradigm/construct the State would be required to do so in order to trigger the administrative process in the first place.

Secretary Spelling's pre-enforcement argument also ignores a crucial difference in how sanctions are imposed. In Thunder Basin, the Secretary recommended a civil penalty to the independent commission, and the commission imposed the penalty, subject to specific factors. *See Thunder Basin v. Reich*, 510 U.S. 200, 204 n.4, 205 n.6, 208 (1994). Here the Secretary contends that she has full, unreviewable discretion to withhold all federal educational funding, if a State is found to have violated either the Act or its assurances.<sup>3</sup> Therefore, if the State

---

<sup>3</sup> As of the date of this filing and despite inquiry, the State has not heard from the Secretary regarding the Court's suggestion of foregoing any penalties or withholding of funds if the State were to pursue its claims through the Secretary's administrative procedure. The State must assume that all of its federal educational funding would be at risk if it elected to ignore the

submitted itself to the Secretary's administrative process -- a process that by definition must focus upon whether the State has violated the Act or its assurances, and not on the correct interpretation of a statutory provision -- and if the administrative law judge ruled that the State had violated the Act or its assurances (and indeed, given the Secretary's directive that the State must be in violation in order to invoke the administrative process in the first place, how could it not so rule), there remains the real possibility that there ultimately would be court clarification on the meaning of the Unfunded Mandates Provision in the State's favor, and the State nonetheless would be faced with losing all of its federal educational funding retroactively. In short, the State could prevail on its interpretation of the Unfunded Mandates Provision and still be deemed to have violated its assurances, and thus be subject to full, purportedly unreviewable, sanctions -- a Pyrrhic victory indeed.

Under the Secretary's legal argument, in order for a state to obtain a judicial determination on the meaning of an educational statutory provision, and to correct the Secretary's misinterpretation and misapplication of that provision, the State must be willing to lose all of its federal funding at least temporarily, and risk losing it permanently through an unreviewable sanction imposed by the Secretary. Moreover, the Secretary's administrative process does not even permit the State to initiate a proceeding, instead requiring that a state "violate" the law, and its assurances, and wait for the Secretary to initiate an enforcement proceeding. Neither cooperative federalism nor the rule of law requires such brinkmanship in order to obtain a declaratory judgment on the meaning of a federal statute.

In sum, the State faces real, imminent, immediate harm. It is currently being required to spend State funds to comply with the mandates of the NCLB Act as interpreted by the Secretary,

---

directives resulting from the Secretary's denial of its waiver requests--at least prior to a "final agency decision." *See* 20 U.S.C. § 1234d(d).

in direct contravention of the express language of the Unfunded Mandates Provision and the state statute that was predicated on that language. *See* Am. Compl. ¶¶ 82-85. The Secretary's effort to convert a legitimate action for declaratory relief from her erroneous interpretation of a statutory provision into an enforcement action against a State currently in full compliance should be rejected.

**II. THE PARTIES' FACTUAL DISPUTES OVER FUNDING LEVELS CANNOT SUPPORT THE SECRETARY'S LEGAL CHALLENGE.**

Woven into her standing challenge and as part of her 12(b)(6) motion, the Secretary argues that federal funding for assessments would be sufficient if the State would only accept Deputy Secretary Simon's oral suggestions to dilute the quality of Connecticut's assessments. Notably, the Secretary is silent on whether federal funding overall was sufficient to meet the State's overall costs of complying with the NCLB Act requirements. In their First Amended Complaint, the State clarifies the scope of its underfunding allegations.

The State contends that overall federal NCLB funding is insufficient to meet the State's overall costs of complying with the NCLB Act requirements. *See, e.g.*, Am. Compl. ¶¶ 8-9, 14, 18-20, 78-79, 83-84, 165. The State also contends that federal NCLB funding for assessments (currently \$5.8 million per year) is insufficient to meet the State's current annual costs for assessments of \$14.4 million, and its modified special education assessments. *See* Am. Compl. ¶¶ 76-81, 127, 146, 158-166, 168-69. For March 2006 assessments, the NCLB mandate is underfunded by \$8.6 million. Am. Compl. ¶ 81.

At oral argument, the Court asked Plaintiffs to amend their complaint to specify whether federal funding would be sufficient to meet the State's costs if the State were to adopt Deputy Secretary Simon's suggestions regarding simplified assessments. As an initial matter, these suggestions were not a formal commitment by the Secretary, but rather informal, oral

suggestions. Am. Compl. ¶¶ 134-36. These informal, oral suggestions were: i) administer multiple-choice tests in grades 3, 5 and 7, with the approved Connecticut tests administered in grades 4, 6, 8 and 10; ii) use multiple-choice for the NCLB science tests in grades 5, 8 and 10; and iii) replace its writing assessments as its third academic indicator with daily attendance records. Even if the State adopted these suggestions, the federal funding for assessments would still be insufficient to meet the State's expenses for assessments. Am. Compl. ¶¶ 139, 167.

The State further contends that such a scheme would significantly degrade its assessment process, and thus undermine the core purpose of the Act. The NCLB Act repeatedly and consistently prohibits the Secretary from mandating, directing or controlling a State's curriculum, standards or assessments. Am. Compl. ¶¶ 54, 137. The Secretary is expressly forbidden from requiring specific assessment instruments as a condition of approval of a state plan. Am. Compl. ¶ 54. Unlike Mr. Simon's oral suggestion, the State's current testing programs, including a writing assessment, have been processed through a peer review process. Am. Compl. ¶¶ 36-37. Further, they have been approved by the Secretary as appropriate and within the scope of the NCLB Act requirements. Am. Compl. ¶¶ 38-39. The Secretary notably did not hold that Connecticut's plan, standards and assessments were beyond the scope of the Act, nor did the Secretary excuse the State from complying with its submitted and approved plan. Am. Compl. ¶¶ 40, 90. The State's program, including its waiver requests, are fully consonant with the letter and purpose of the NCLB Act.

The Secretary's litigation posture that Mr. Simon's oral suggestions now constitute an approved option, and that a minimalist approach (at least in alternate years and for purposes of the third academic indicator) is all that is "required" by the Act, is inconsistent with the language and purpose of the Act, and is inconsistent with the Secretary's unqualified approval of the

State's plans. Nonetheless, even if the State adopted the oral suggestion by Mr. Simon, federal funding would still be inadequate. Am. Compl. ¶¶ 139, 167.

State funding for education has been increasing since 2002. Am. Compl. ¶ 75. As repeatedly alleged by the State, federal funding has been insufficient to cover the State's overall expenses of compliance with the NCLB Act's mandates. Am. Compl. ¶¶ 8-9, 14, 18-20, 78-79, 83-84, 165. For purposes of the motion to dismiss, the State's good-faith allegations must be taken as true, and all reasonable factual inferences from those allegations must be interpreted in the State's favor. *See, e.g., Courtenay Communications Corp. v. Hall*, 334 F.3d 210, 213 (2d Cir. 2003). The Secretary's efforts to convert factual disputes over the adequacy of federal funding into a jurisdictional bar should be rejected.

**III. IN ITS ADMINISTRATIVE APPEAL, THE STATE CHALLENGES THE SECRETARY'S PROCESS AS WELL AS HER ARBITRARY, CAPRICIOUS, ABUSE OF DISCRETION DECISIONS.**

With respect to the State's appeal under the Administrative Procedures Act, the State has clarified its legal and factual allegations.

The State expressly alleges that the Secretary abdicated her statutory obligation to consider waiver requests of any statutory or regulatory provision, and refused to exercise any discretion whatsoever regarding the State's request to conduct formative testing in the alternate-grades. Am. Compl. ¶¶ 13, 152. Before she made her decision, the Secretary only saw the two-and-one-half pages of the Commissioner of Education's January 14, 2005 letter requesting the waivers and seeking to present in person the reasons why the waiver should be granted. Am. Compl. ¶ 104. Neither the Secretary nor any of her staff contacted the Commissioner or her staff for either information or a meeting prior to issuing the February 28, 2005 denial. Am. Compl. ¶ 119. The Amended Complaint includes illustrative references to the Secretary's abdication of her statutory duty on this particular issue, including specific references to some of her public

statements that annual every grade testing is a bright line of the Act, and that under no circumstances would she consider a waiver. *See* Am. Compl. ¶¶ 120-22, 125, 129-33, 153-54.

The State also has specified that its legal claims under the APA are brought pursuant to 5 U.S.C. § 702, 703, 704, and 706(2)(A), (B), & (C). It is the State's contention that the Secretary's denial of the waiver requests, her erroneous interpretation of the Unfunded Mandates Provision, and her actions implementing her interpretation are unlawful, *ultra vires*, in excess of statutory jurisdiction, authority or limitations, short of statutory right, and contrary to constitutional right, power, privilege or immunity.

### **CONCLUSION**

For the reasons set forth above, in the State's opposition brief, and as presented at oral argument, the State respectfully requests that the Court deny the Secretary's Motion to Dismiss.

PLAINTIFFS  
THE STATE OF CONNECTICUT and  
the GENERAL ASSEMBLY OF  
THE STATE OF CONNECTICUT

BY: /s/ Richard Blumenthal  
Richard Blumenthal  
Attorney General  
Federal Bar No. ct05924  
55 Elm Street, P.O. Box 120  
Hartford, CT 06141-0120  
Tel: (860) 808-5020; Fax: (860) 808-5347  
[Attorney.General@po.state.ct.us](mailto:Attorney.General@po.state.ct.us)

BY: /s/ Clare E. Kindall  
Clare E. Kindall  
Assistant Attorney General  
Federal Bar No. ct13688  
Ralph E. Urban  
Assistant Attorney General  
Federal Bar No. ct00349  
55 Elm Street, P.O. Box 120  
Hartford, CT 06141-0120  
Tel: (860) 808-5020; Fax: (860) 808-5347  
[Clare.Kindall@po.state.ct.us](mailto:Clare.Kindall@po.state.ct.us)  
[Ralph.Urban@po.state.ct.us](mailto:Ralph.Urban@po.state.ct.us)

**CERTIFICATION OF SERVICE**

I hereby certify that on February 28, 2006, a true and accurate copy of the foregoing State's Memorandum Regarding the First Amended Complaint was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of electronic Filing. Parties access this filing through the court's CM/ECF System. Pursuant to the Court's standing order, a courtesy copies were also provided to chambers by overnight mail.

/s/ Clare E. Kindall \_\_\_\_\_  
Clare E. Kindall  
Assistant Attorney General